APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT
Nov. 12, 1954.

F. P. NEWPORT CORPORATION, Limited, Appellant,
vs.
PAUL W. SAMPSELL, Trustee in Bankruptcy of the estate of F. P. Newport Corporation, Limited, et al., Appellees.

No. 14572

Appeal from the United States District Court for the Southern District of California, Central Division; Paul J. McCormick, Judge.

Morris Lavine, Los Angeles, Cal., for appellant.

Norman A. Bailie, Richard A. Turner, Bailie, Turner, Lake & Sprague, Los Angeles, Cal., for appellee.

Before MATTHEWS and ORR, Circuit Judges, and WIIG, District Judge.

PER CURIAM.

This purports to be an appeal by F. P. Newport Corporation, Limited, bankrupt, from a judgment affirming an order of a referee in bankruptcy. In re Newport Corp., D.C.S.D. Cal., 123 F. Supp. 95. In this court, two motions have been filed—(1) a motion of Paul W. Sampsell, trustee in bankruptcy, to dismiss the purported appeal and (2) a motion purportedly filed by the bankrupt to vacate the judgment and remand the case to the District Court. The motion to vacate and remand is denied. The motion to dismiss is granted, and the purported appeal is dismissed.

APPENDIX B

PAUL W. SAMPSELL, TRUSTEE IN BANKRUPTCY
for F. P. NEWPORT CORPORATION, LTD.

STATEMENT OF RECEIPTS AND DISBURSEMENTS
INCLUDING RECEIPTS AND DISBURSEMENTS DURING RECEIVERSHIP
MARCH 23, 1935 to JANUARY 31, 1955, INCLUSIVE

RECEIPTS	
Oil Income and Royalties	$1,279,[illegible].63
Sales of Real Estate—Miscellaneous Lots	[illegible].[illegible]
—San Fernando Valley Property	[illegible].[illegible]
—Verdugo Park and Acreage	[illegible].[illegible]
—40 Acres—U. S. Government	[illegible].[illegible]
—Crescenta Oaks—Tract 9697	[illegible].[illegible]
—State Highway Dept.—Freeway Deal	[illegible].[illegible]
—9 Acres Deal—Lot 20, Rs. Los Cerritos	[illegible].[illegible]
—Waterfront—Compromise Deal	[illegible].[illegible]
—Deposit—All Assets	[illegible].[illegible]
Rentals	[illegible].[illegible]
Interest Collections	[illegible].[illegible]
Taxes	[illegible].[illegible]
Sales of Equipment	[illegible].[illegible]
Notes Receivable	[illegible].[illegible]
Sale of Drew Judgment	[illegible].[illegible]

—Covenants Onko—Trust 8847		45,500.00
—State Highway Dept.—Freeway Deal		25,425.00
—9 Acres Deal—Lot 28, Rn. Los Cerritos		47,600.00
—Waterfront—Compromise Deal		222,042.67
—Deposit—All Assets		40,700.00
Rentals		99,503.69
Interest Collections		6,900.44
Taxes		3,726.65
Sales of Equipment		1,543.92
Notes Receivable		900.10
Sale of Drew Judgment		10,000.00
Miscellaneous Income		3,698.91
TOTAL INCOME		$2,665,407.83

DISBURSEMENTS

Payment on Property in Trust			
Principal—Paid in Cash	$1,116,071.21		
—Paid in Property	222,042.67		
Interest Paid	356,198.53		
Taxes	267,424.51		
Street Improvement Bonds—Principal	6,521.19		
—Interest	611.53		Security First
Oil Lease and Dehydration	62,074.85		National Bank
Atty. Fee—Wm. H. Neblett—Waterfront	7,500.00		
Settlement—City of Long Beach	5,830.90		
Bank Fees—Deeds, Leases, Notary, etc.	612.01		
Tax Refund Claims—Trust Properties	96.26		
TOTAL PAID ON PROPERTY IN TRUST	$2,044,983.66		
Taxes Paid—Property Outside Trust		42,384.66	
—Income Tax—Federal and State		59,258.38	
Interest Paid on Income Tax		18,525.63	
Salaries—F. P. Newport to Nov. 30, 1943		25,466.62	
—Bookkeeper and Stenographer		49,551.50	
Agents Commissions		23,269.98	
Bankruptcy Fees and Expenses		197,247.35	
Rent		16,300.00	
Street Improvement Bonds—Principal		2,155.57	
—Interest		695.99	
Property Upkeep—Park, Ranch, etc.		15,852.98	
Mileage Expense—Property Inspection		5,147.40	
Advertising		3,642.02	
Title Expense		5,623.69	
Trust Deeds, Claims and Interest Paid		53,398.19	
Other Expenses		28,367.94	
TOTAL DISBURSEMENTS			2,591,870.56
BALANCE ON HAND—JANUARY 31, 1955			$ 73,537.27
Distribution—General Trustee Fund		$ 14,672.88	
—Sale Impound Fund		18,164.39	
—Sale Deposit Fund		40,700.00	
		$ 73,537.27	

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The Delaware statutes do not confer on a bankrupt corporation whose charter has become void, the right to appeal from an order authorizing and confirming the sale of the remaining unliquidated assets of the bankrupt corporation made pursuant to a final order of liquidation 14

A dissolved and defunct corporation is without right or power to do any act necessary to effect a valid appeal from an order authorizing and confirming a liquidating sale of remaining assets, exclusive of cash, under a final order of liquidation; and the same rule should apply to every bankrupt, natural or corporate 32

The remaining assets of the bankrupt estate are insufficient to discharge the approved unsecured and unpaid claims, the interest due thereon, and the remaining costs, fees and expenses of administration 38

Petitioner in its Point III, page 45, of its petition for writ of certiorari, relative to the dismissal of petitioner's proposed plan of reorganization under Chapter X, is not well taken for two reasons, namely, (1) the purported appeal herein involved does not purport to be an appeal therefrom, and (2) the order of dismissal has long since become final 47

Petition's contention under Point VI, page 55 of its petition for writ of certiorari to the effect that the District Court erred in directing a sale in Solido rather than in separate parcels, has no foundation upon which to rest 48

The bankrupt was not in anywise injured (1) by the fact that Mr. Neblett represented Mr. and Mrs. Colter on the purchase of the unliquidated assets; or (2) by the fact, if it be a fact, that Mr. and Mrs. Colter were acting for themselves and as the undisclosed agent for one or more associates 48

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IN THE

Supreme Court of the United States

October Term, 1954

No. .....

F. P. NEWPORT CORPORATION, LTD.,

Petitioner,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of F. P. Newport Corporation, Ltd., Bankrupt,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice Earl Warren, and to The Honorable Associate Justices of the Supreme Court of the United States:

Respondent, Paul W. Sampsell, as Trustee in Bankruptcy of the Estate of F. P. Newport Corporation, Ltd., presents his brief in opposition to the petition of the bankrupt for a writ of certiorari herein, and in support of an order denying said writ.

Reasons for Denying the Writ.

Pursuant to the provisions of Supreme Court Rule 26, respondent hereby designates the following matters and grounds why the cause should not be reviewed by the Supreme Court of the United States:

1. The Ninth Circuit Court of Appeals has not rendered a decision in conflict with the decision of another court of appeals in the same matter.

2. The Ninth Circuit Court of Appeals has not decided an important state or territorial question in a way in conflict with applicable state or territorial law.

3. The Ninth Circuit Court of Appeals has not decided an important question of federal law, which has not been, but should be, settled by the Supreme Court of the United States.

4. The Ninth Circuit Court of Appeals has not decided a federal question in a way in conflict with applicable decisions of the Supreme Court of the United States.

5. The Ninth Circuit Court of Appeals has not so far departed from the accepted and usual course of judicial proceedings, nor so far sanctioned such departure by a lower court, as to call for an exercise of the power of supervision vested in the Supreme Court of the United States. (See Sup. Ct. Rule 19(b).)

6. Petitioner has failed to present with accuracy, brevity and clearness facts essential to a clear and adequate understanding of the points which petitioner claims require the consideration of the Supreme Court of the United States.

7. That many of the purported facts stated in the petition for writ of certiorari herein are inaccurate and misleading, and do not serve to give to the Supreme Court of the United States "whatever is essential to a ready and adequate understanding of the points which petitioner claims require consideration by this court." (See Sup. Ct. Rule 38, par. 6.)

8. The petition for writ of certiorari filed herein is not "prefaced by a motion for leave to file such petition" as required by Supreme Court Rule 38, paragraph 1, nor has any such motion and petition been served on respondent as required, and the petition filed herein does not "set forth with particularity why the relief sought is not available in any other court or cannot be had through other appellate processes," as required by Supreme Court Rule 38, paragraph 5.

9. The petition for writ of certiorari does not (as required by Supreme Court Rule 38, paragraph (1), have appended thereto (1) the (a) memorandum opinion and (b) supplement thereto of Referee Hunt; nor (2) said Referee's findings of fact, conclusions of law and order authorizing and confirming sale to R. T. and Bobbie E. Usher; nor (3) the prior Findings of Fact, Conclusions of Law and Order of Referee Authorizing and Confirming Sale of Property to R. T. Usher; nor (4) the Order of Judge McCormick made upon the review of said last mentioned Order; nor (5) the Order of the Judge dismissing petition under Chapter X of the Bankruptcy Act of 1938.

The omitted documents specified above in clauses (1)(a), (1)(b), (2), (3), (4), (5) of this Paragraph 9, will be found in said document file at the following pages, respectively:

(1)(a)	D 394*
(1)(b)	D 431
(2)	D 433
(3)	D 215
(4)	D 329
(5)	D 331

Correction of Erroneous Statements in Petitioner's Statement of the Case, and Statement of Additional Facts.

Petitioner at page 11 in its petition omitted to make reference to any ground for dismissing the purported appeal, other than that petitioner's charter had been declared void by the State of Delaware for failure to pay the Delaware franchise taxes.

Actually, the motion to dismiss was based on six different grounds. [R. 598-602.]

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*The Clerk of the District Court of the United States, Southern District of California, Central Division (hereinafter usually called the District Court), has compiled a file of all documents specified by appellant and appellee for use on the purported appeal to the United States Court of Appeals (hereinafter usually called the Court of Appeals), and has numbered the pages in said file. He has also compiled an index to the documents included in said file, and opposite each document described has specified the page in said document file where the document can be located. The Clerk of the Circuit Court has advised us that said document file and index thereto are now on file in the Supreme Court of the United States (hereinafter usually called the Supreme Court). That document file will hereinafter be referred to as "D", followed by the number of the page where the document appears.

The objects of the motion, as more fully stated therein, were (a) to save the bankrupt estate the cost of printing the record on the purported appeal; (b) to save the bankrupt estate attorney's fees and costs of printing briefs incident to a hearing of the purported appeal on the merits, and (c) to enable the trustee without further hindrance and delay by the bankrupt to comply with the order of liquidation. [R. 601-602.]

The grounds for dismissal, greatly condensed, were:

1. The bankrupt is not an aggrieved party; that the assets will be insufficient to pay the allowed claims, interest thereon, and the remaining costs, fees and expenses of administration; and that the bankrupt has no financial interest in the subject matter of the purported appeal;

2. That the bankrupt has no standing to appeal;

3. That bankrupt since April 1, 1937, has been a defunct corporation without legal capacity to prosecute the purported appeal;

4. That the purported authority from the corporation to the attorney who filed the purported appeal was insufficient to legally authorize him to file such notice, and the former directors and officers of the corporation were without power to confer such authority;

5. That to permit said purported appeal to stand would be contrary to the spirit and purpose of the Bankruptcy Act; and,

6. The purported appeal is invalid, confers no jurisdiction on the court, and has been taken for the sole purpose of hindering and delaying the Trustee in the performance of his statutory duties. [R. 598-601.]

The Court of Appeals granted the motion to dismiss without any specification of the ground or grounds upon which it acted. [R. 707.] It must be assumed, therefore, that it was granted on all grounds enumerated in the motion.

The petition in bankruptcy was filed against the bankrupt on March 19, 1935 [R. 604], and it was adjudicated a bankrupt on the 12th day of January, 1937, with the consent of the bankrupt [R. 604; Petition for Writ of Certiorari, last line, p. 14], and it became a defunct corporation on April 1, 1937, and has never since been revived. [Ex. E, R. 639.]

There is no Delaware statute which provides that a defunct corporation would be revived if the Trustee were to pay Delaware's claim No. 32 for $471.25 [R. 633-635], or the Delaware franchise taxes with or without penalties, for which bankrupt's charter was forfeited on April 1, 1937.

There is nothing in the record (or elsewhere) to show any demand was ever made upon the Trustee to pay Delaware's said claim (a) before the purported appeal was taken to the Court of Appeals, or (b) before said court dismissed said purported appeal.

There is nothing in the record (or elsewhere) to show that the Trustee ever had or now has any funds in his possession which he could have heretofore lawfully applied or which he could now lawfully apply toward the payment of Delaware's said claim, nor that the claims having priority over Delaware's claim have been paid. (See Sec. 64 of Bankrupty Act of 1938, U. S. C., Title 11, Ch. 7, Sec. 104.)

The corporation acting through two of its former officers is the only one which under the Delaware statutes is authorized to take the proceedings necessary to revive a defunct Delaware corporation.

A Delaware corporation whose charter has been forfeited is deemed to have a continuing existence for only limited purposes, none of which are present in this case.

The Trustee has no duty or power to revive a bankrupt corporation whose charter has been forfeited. (U. S. C., Title 11, Ch. 5, Sec. 75.)

The fact that the trustee paid California franchise taxes after the time the bankrupt forfeited its charter, could not operate to revive a Delaware corporation whose charter had been forfeited. (See Rule 17, par. (b) of Fed. Rules of Civ. Proc.; *Fidelity Metals Corp. v. Risley,* 72 Cal. App. 2d 377, 381.)

No California franchise taxes were paid after the Trustee filed his petition for an order of liquidation. This petition was filed April 14, 1952. [R. 604, D 86.] On May 26, 1952, the Referee ordered the Trustee to proceed with all due diligence with the sale of the assets, subject to confirmation by the court "to the end that the assets of said estate may be speedily converted into money, the expenses of administration paid and the residue paid to the creditors as required by law." [R. 605-606.]

The bankrupt and certain creditors filed a petition to review that order [D 106]. Upon the hearing thereof, after argument, and after calling attention to the fact that this was a *"protracted"* bankruptcy proceeding Judge

McCormick in his order of November 28, 1952, stated that he had believed

> "that if decision on the Referee's order of liquidation were deferred for a reasonable period, some other lawfully authorized equitable method of settlement would be forthcoming and duly proposed. Such other proceeding now seems to be unavailable. *Accordingly,* the Referee's order of liquidation dated May 26, 1952, is confirmed." [D 116.]

This review was regularly heard and argued on July 24, 1952, and the foregoing ruling thereon was not made until November 28, 1952. [R. 606-607.]

No appeal was taken from the court's order of confirmation, and said order is final. [R. 606.]

On November 19, 1953, bankrupt and its former president Fred P. Newport, filed with the Referee a petition entitled "PETITION FOR AN ORDER APPOINTING A DISBURSEMENT AGENT; DIRECTING SAID AGENT TO RECEIVE FROM ESCROW HOLDER AND TRUSTEE SUMS TOTALING $438,000.00 AND TO DISBURSE SAME TO PERSONS FOUND BY THE COURT TO BE ENTITLED TO SAME; STAYING ALL OTHER PROCEEDINGS AND DISMISSING THE BANKRUPTCY PROCEEDINGS HEREIN." [R. 607.] Said petition set forth an alleged offer of Earl P. Snyder (who was one of the bidders on the sale to Colter and wife). [R. 607, 118, D 291.]

On December 18, 1953, the Trustee filed with the Referee a motion to dismiss said petitiion on the grounds:

"1. That the Court has no jurisdiction over the subject matter of said petition.

"2. That said petition is a sham and is groundless, fictitious, vexatious and constitutes an imposition on the

> Court and an unjust burden on the Trustee and said Bankrupt Estate; and that a dismissal of said petition would be in the furtherance of justice." [R. 607-608; D 298.]

On a hearing regularly had before the Referee on December 30, 1953, the Referee made an order granting the Trustee's motion on all grounds above stated. [R. 608; D 301.]

Said petitioners filed a petition to review said last mentioned order. [R. 608; D 303.] The order of the Referee was affirmed, and the petition for review was dismissed on January 19, 1954. [D 312.]

On March 15, 1954, following the receipt of an amended bid by Mr. and Mrs. Colter, the Trustee filed an Amended and Supplemental Petition for Authority to Sell and for Confirmation of Sale of Real and Personal Property to R. T. and Robbie E. Colter. [D 366.] Objections thereto were filed by the bankrupt and certain creditors. [D 380.] After due notice [D 378], a hearing of said amended and supplemental petition and said objections thereto was had on April 6, 1954, at which time, after spirited bidding at public auction, the property was sold to Mr. and Mrs. Colter. Thereafter on May 3, 1954, the Referee made an order vacating the Referee's prior order of December 9, 1953 (confirming the original bid of R. T. Colter) confirming the sale to Mr. and Mrs. Colter for the sum of $407,000.00, taxing costs against the objecting creditors, and directing the Trustee, upon receipt of said sum, to convey the property to the Colters. [D 433.]

The bankrupt and certain creditors petitioned for a review of this order. [D 416.] This review was regularly had before Chief Judge Yankwich of the District Court.

Judge Yankwich, in his opinion [R. 617-627] affirming the order of the Referee confirming the sale of the assets to R. T. and Robbie E. Colter [D 433], calls attention to the facts (1) that the bankruptcy estate had been pending for over nineteen years; (2) that Judge McCormick of the District Court had previously referred to the matter as a "'protracted' administration"; (3) that at all times it had been the contention of the bankrupt that matters could have been worked out differently; (4) that the Referee had correctly stated: "A bankrupt case is a lot different than where the property is in private hands. If the man has property in his own hands not subject to legal process or creditors' claims, he can wait indefinitely. But a bankrupt estate can't. It is the creditors' funds and they are entitled to get paid sometime. The only question here is haven't we come to the end of the trail? How much longer are we going to put the creditors off, how much longer are they going to be put off before they get their money? If I had any evidence before me to show that you could within a reasonably short time—any definite evidence—get a better buyer, that would be an entirely different situation"; (5) that the two most recent acts in the bankruptcy proceeding, which occurred before the present Order of Sale, were opposed upon the same nebulous ground that, as the condition of the estate is improving, additional time might bring better results; (6) that Judge McCormick had appended to his order of October 22, 1951, a note to the effect that he had delayed his decision for almost four months to accord to all interested parties an opportunity "to submit for consideration a plan or method that is more beneficial and equitable to the estate than the compromise under review. None such has been presented or offered"; (7) that on review of the

Referee's order of sale of December 9, 1953, the District Court had referred the matter back to the Referee "for the purposes of conducting a hearing and if possible obtaining a definite and positive and certain bid for the property; and if the present bidder desires to withdraw his deposit within ten days, he may do so, and if he does not, his bid may be considered when further proceedings are had before the referee"; (8) that an amended and supplemental petition for authority to sell had been filed on March 15, 1954, and new notices were given; (9) that petitioners (consisting of bankrupt and certain creditors) [D 380] filed objections thereto; and (10) that at the conclusion of the hearing of said amended and supplemental petition and said objections thereto the Referee, after bidding in open court, had confirmed the sale to the Colters, and had set forth in a 37-page opinion his reasons for so doing. (See Judge Yankwich's opinion in 123 Fed. Supp. 95.)

General Order in Bankruptcy 18 requires sales to be made at public auction. U. S. C., Title 11, Chapter 6, Sec. 94(a)(4), requires notice of sales to be given to creditors by mail. There is no requirement for advertising in any newspaper. However, on the sale here involved to Mr. and Mrs. Colter, there was one advertisement by newspaper. In addition thereto, the Trustee persistently endeavored to find a purchaser. [R. 24-45, 50.] There was spirited bidding at the sale on behalf of Mr. and Mrs. Colter by their agent, Mr. Zeller, on behalf of Mr. William Berk by attorney Jerome Weber, and by Mr. Earl P. Snyder in person. [R. 54-119; 118-119.]

Before the filing by the Trustee of said amended and supplemental petition, to wit, on March 9, 1954, R. T. Colter and his wife, Robbie E. Colter, filed an amended

bid wherein it was stated to be the "intention to make it conform to the order of the Hon. Paul J. McCormick United States District Judge, entered February 9, 1954." Then follows in detail the amended bid. [D 366.]

In said objection to said last mentioned petition, the objectors prayed as follows:

> "WHEREFORE, your objectors pray that the trustee be granted no relief as prayed for by him in paragraphs '3', '4' and '6' of his said amended and supplemental petition; that the offer described in said petition be rejected; that the assets described therein be not sold enmasse, or in any manner, or at all; and that under the direction and guidance of the Court that the 100% rehabilitation of the bankrupt corporation be accomplished through one of the reorganization plans hereinbefore described that will be found by the Court and the parties interested the best for the accomplishment of the purposes hereinbefore outlined and the dismissal of the bankruptcy proceedings herein." [R. 611-612; D 380.]

Mr. Fred P. Newport, who was the president of the bankrupt at the time its charter was forfeited, has signed the name of the bankrupt, by him as president, to the Opposition to Motion to Dismiss the Purported Appeal to the Court of Appeals.

Throughout those objections, as well as throughout the bankruptcy, Mr. Newport appears to have considered himself as the guiding hand of the bankrupt corporation, and the administrator of its assets. [R. 656-675.] Prior to the attempted appeal herein, he always joined with him certain creditors of the corporation who possessed the

right to question the acts of the Trustee and the orders by the Referee and District Court Judges. However, on the bankrupt's attempted appeal its prior companions abandoned it, and for the first time the bankrupt was left to stand alone. Since on previous reviews and appeals it was necessary to determine the matter on the merits, the right of the bankrupt to participate therein was not questioned. The attorney who signed the purported notice of appeal [R. 593], had never before appeared for the bankrupt. [R. 614.] The purported resolution of the bankrupt [R. 594], recites the holding of a special meeting of the bankrupt corporation on August 10, 1954, and the passage of a resolution authorizing Milton B. Safier, who signed the purported notice of appeal, to take said purported appeal. Between pages 676 and 677 of the Record appears a purported waiver of notice signed by all of the purported directors of the defunct bankrupt corporation, purporting to consent to the holding of a "Special Meeting of the Board of Directors of said corporation" for the purpose of adopting said purported resolution and another resolution thereto attached.

If such a meeting was held, it clearly constituted a corporate act, and if valid, would operate to create a new obligation against the defunct corporation for attorney's fees and costs and expenses incurred in carrying out the employment.

We think this was criminal offense under Title 8, Chapter 5, Section 513 of the New Delaware Code which became effective February 12, 1953, elsewhere herein quoted in full.

The Delaware Statutes Do Not Confer on a Bankrupt Corporation Whose Charter Has Become Void, the Right to Appeal From an Order Authorizing and Confirming the Sale of the Remaining Unliquidated Assets of the Bankrupt Corporation Made Pursuant to a Final Order of Liquidation.

The sections of the Delaware Corporation Franchise Tax Law, so far as applicable, are Sections 510, 511, 512 and 513 of Title 8, Chapter 5, of the New Delaware Code, which became effective February 12, 1953. Our examination of these sections, to the extent quoted below, indicates that they stand at the present time as they stood (but numbered differently) in the Revised Code of Delaware of 1935.

> "Section 510. Failure to pay tax for two years; charter void; extension of time.
>
> "If any corporation, accepting the provisions of the Constitution of this State and coming under the provisions of chapter 1 of this title, or any corporation which has heretofore filed or may hereafter file a certificate of incorporation under the provisions of said chapter, neglects or refuses for two consecutive years to pay the State any franchise tax or taxes, which has or have been, or shall be assessed against it, or which it is required to pay under the provisions of this chapter, the charter of the corporation shall be void, and all powers conferred by law upon the corporation are declared inoperative, unless the State Tax Board, for good cause shown to it, gives further time for the payment of the tax or taxes, in which case a certificate thereof shall be filed by the Board in the office of the State Tax Department stating the reason therefor." (Revised Code of Delaware of 1935, Ch. 6, Sec. 105, Franchise Tax Law, Sec. 71.)

"Sec. 511. Repeal of charters of delinquent corporations; report to Governor and proclamation.

"On or before the first Tuesday of January in each year, the State Tax Department shall report to the Governor a list of all the corporations, which for two years next preceding such report, have failed, neglected or refused to pay the franchise taxes assessed against them or due by them, under the laws of this State, and the Governor shall forthwith issue his proclamation declaring that the charters of these corporations are repealed." (Revised Code of Delaware of 1935, Ch. 6, Sec. 106, Franchise Tax Law, Sec. 72.)

"Sec. 512. Filing and publication of proclamation; noting repeal in recorder's office.

"The proclamtion of the Governor shall be filed in the office of the Secretary of State and advertised in at least one, and not more than three, newspapers published within this State. Upon the filing of the proclamation, the Secretary of State shall transmit forthwith to the recorder of each county of this State a certified copy of the proclamation, and each recorder shall, upon receipt of such certified copy, forthwith mark in brief upon the margin of the record of the certificate of incorporation of the corporation named in the proclamation, which is of record in his office, the fact that the charter of the corporation is repealed, and the date of the repeal." (Revised Code of Delaware of 1935, Ch. 6, Sec. 107, Franchise Tax Law, Sec. 73.)

"Sec. 513. Acting under proclaimed charter; penalty.

"Whoever exercises or attempts to exercise any powers under the certificate of incorporation of any corporation which has been proclaimed by the Governor, after the issuance of the proclamation, shall be fined

not more than $1,000 or imprisoned not more than one year, or both." (Revised Code of Delaware of 1935, Ch. 6, Sec. 108, Franchise Tax Law, Sec. 74.)

The sections of the Delaware General Corporation Law, so far as applicable, are Sections 278, 279, 280, 281 and 282 of Subchapter X, and Sections 312 and 314 of Subchapter XII, of Title 8, Chapter 1, of the New Delaware Code which became effective February 12, 1953. Our examination of these sections, to the extent quoted below, indicates that they stand at the present time substantially as they stood (but numbered differently), in the Revised Code of Delaware of 1935.

"Sec. 278. Continuation of corporation after dissolution for purposes of suit and winding up affairs.

"All corporations, whether they expire by their own limitation or otherwise dissolved, shall nevertheless be continued, for the term of three years from such expiration or dissolution, bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which the corporation shall have been established. With respect to any action, suit, or proceeding begun or commenced by or against the corporation prior to the expiration or dissolution and with respect to any action, suit or proceeding begun or commenced by or against the corporation within three years after the date of the expiration or dissolution, the corporation shall, only for the purpose of such actions, suits or proceedings so begun or commenced, be continued bodies corporate beyond the three-year period and until any judgments, orders, or decrees therein shall be fully

executed." (Revised Code of Delaware of 1935, Ch. 65, Sec. 2074, General Corporation Law, Sec. 42, Laws of Delaware of 1941, Vol. 43, Ch. 132.)

"Sec. 279. Trustees or receivers for dissolved corporations; appointment; powers.

"When any corporation organized under this chapter shall be dissolved in any manner whatever the Court of Chancery on application of any creditor or stockholder of the corporation, at any time, may either appoint one or more of the directors thereof trustees, or appoint one or more person to be receivers, of and for the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by the corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation. The powers of the trustees or receivers may be continued as long as the Court of Chancery shall think necessary for the purposes aforesaid." (Revised Code of Delaware of 1935, Ch. 65, Sec. 2075, General Corporation Law, Sec. 43. Laws of Delaware of 1951, Vol. 48, Ch. 353.)

"Sec. 280. Jurisdiction of court.

"The Court of Chancery shall have jurisdiction of the application prescribed in section 279 of this title and of all questions arising in the proceedings thereon, and may make such orders and decrees and issue injunctions therein as justice and equity shall require." (Revised Code of Delaware of 1935, Ch. 65, Sec. 2076, General Corporation Law, Sec. 44.)

"Sec. 281. Duties of trustees or receivers; payment and distribution to creditors and stockholders.

"The trustees or receivers of a dissolved corporation, after payment of all allowances, expenses and costs, and the satisfaction of all special and general liens upon the funds of the corporation to the extent of their lawful priority, shall pay the other debts due from the corporation, if the funds in their hands shall be sufficient therefor, and if not, they shall distribute the same ratably among all the creditors who shall prove their debts in the manner that shall be directed by an order or decree of the court for that purpose. If there shall be any balance remaining after the payment of the debts and necessary expenses, they shall distribute and pay the same to and among those who shall be justly entitled thereto, as having been stockholders of the corporation, or their legal representatives." (Revised Code of Delaware of 1935, Ch. 65, Sec. 2077, General Corporation Law, Sec. 45.)

"Sec. 282. Abatement of pending actions; substitution of dissolution trustees or receivers.

"If any corporation organized under this chapter becomes dissolved by the expiration of its charter or otherwise, before final judgment obtained in any action pending or commenced in any court of record of this State against the corporation, the action shall not abate by reason thereof, but the dissolution of the corporation being suggested upon the record, and the names of the trustees or receivers of the corporation being entered upon the record, and notice thereof served upon the trustees or receivers, or if such service be impracticable upon the counsel of record in such case, the action shall proceed to final judgment against the trustees or receivers by the

name of the corporation." (Revised Code of Delaware of 1935, Ch. 65, Sec. 2078, General Corporation Law, Sec. 46.)

"Sec. 312. Renewal, revival, extension and restoration of charter.

"(a) Any corporation existing under the laws of this State, may, at any time before the expiration of the time limited for its existence and any corporation existing under the laws of this State whose charter has become inoperative by law for non-payment of taxes and any corportion existing under the laws of this State whose charter has expired by reason of failure to renew the same or whose charter has been renewed, but, through failure to comply strictly with the provisions of this chapter, the validity of whose renewal has been brought into question, may at any time procure an extension, restoration, renewal or revival of its charter, together with all the rights, franchises, privileges and immunities and subject to all of its duties, debts and liabilities which had been secured or imposed by its original character and all amendments thereto.

"(b) The extension, restoration, renewal or revival of the charter may be procured by filing with the Secretary of State a certificate of any two of its last acting officers or other officers to be elected as provided in subsection (h) of this section, duly sworn or affirmed to by such officers before any person authorized by the laws of this State to administer oaths or affirmations. The certificates shall not be executed by any officer and his assistant officer, as for instance a secretary and an assistant secretary, and the two officers executing the certificate shall not be one and the same person.

"(c) The certificate prescribed in subsection (b) of this section shall state—

(1) The name of the corporation, which name shall be the existing name of the corporation or the name it bore when its charter expired, except as otherwise provided in subsection (f) of this section;

(2) The name of the city, town or place within the county in which its principal office or place of business is located in this State and the name of its resident agent and, in towns or cities of over 6000 inhabitants, the street and number of its principal office or place of business and its resident agent;

(3) Whether or not the renewal, restoration or revival is to be perpetual and if not perpetual the time for which the renewal, restoration or revival is to continue and, in case of renewal before the expiration of the time limited for its existence, the date when the renewal is to commence, which shall be prior to the date of the expiration of the old charter which it is desired to renew;

(4) That the corporation desiring to be renewed or revived and so renewing or reviving its charter was duly organized under the laws of this State;

(5) The date when the charter of the corporation would expire, if such is the case, or such other facts as may show that the charter has become inoperative or void or that the validity of any renewal has been brought into question;

(6) That the certificate for renewal or revival is filed by authority of those who were directors or managers of the corporation at the

time its charter expired or who were elected directors or managers of the corporation as provided in subsection (h) of this section.

"(d) The certificate shall be filed in the office of the Secretary of State, who shall furnish a certified copy of the same under his hand and seal of office. The certified copy shall be recorded in the office of the recorder of the county in which the principal office of the corporation is located in this State, in a book kept for the purpose. The certificate or a certified copy thereof duly certified under the hand of the Secretary of State and his seal of office accompanied with the certificate of the recorder of the county wherein the same is recorded under his hand and seal of office, stating that it has been recorded, the record of the same in the office of the recorder, or a copy of the record duly certified by the recorder, or the record of the certified copy recorded in the recorder's office, shall be evidence in all courts of this State.

"(e) Upon the recording of the certificate the corporation shall be renewed and revived with the same force and effect as if its charter had not become inoperative and void or had not expired by limitation. Such reinstatement shall validate all contracts, acts, matters and things made, done and performed within the scope of its charter by the corporation, its officers and agents during the time when its charter was inoperative or void or after its expiration by limitation, with the same force and effect and to all intents and purposes as if the charter had at all times remained in full force and effect. All real and personal property, rights and credits, which belonged to the corporation at the time its charter became inoperative or void, or expired by limitation and which were not disposed of prior to the time of its revival or renewal shall be vested in the corporation, after its re-

revival and renewal, as fully and amply as they were held by the corporation at and before the time its charter became inoperative or void or expired by limitation, and the corporation after its renewal and revival shall be as exclusively liable for all contracts, acts, matters and things made, done or performed in its name and on its behalf by its officers and agents prior to its reinstatement, as if its charter had at all times remained in full force and effort.

"(f) If, since the charter became inoperative or void for nonpayment of taxes or expired by limitations, any other corporation organized under the laws of this State shall have adopted the same name as the corporation sought to be renewed or revived or shall have adopted a name so nearly similar thereto as not to distinguish it from the corporation renewed or revived under the provisions of this section, then, in such case the renewed or revived corporation shall not be renewed under the same name which it bore when its charter became inoperative or void or expired but shall adopt and be renewed under some other name which, under existing law, could be adopted by a corporation formed and organized under the provisions of this chapter and in such case the certificate to be filed under the provisions of this section shall set forth the name borne by the corporation at the time its charter became inoperative or void or expired and the new name under which the corporation is to be renewed or revived.

"(g) Any corporation seeking to renew or revive its charter under the provisions of this chapter shall pay to this State, in lieu of and in full satisfaction of all franchise taxes and penalties thereon due this State, a sum equal to all franchise taxes and penalties thereon due at the time its charter became inoperative and void for nonpayment of taxes, or expired by limi-

tation or otherwise and shall present to the Secretary of State, together with its certificate of renewal or revival, proof of the payment to the Tax Department of this State.

"(h) If only one or none of the last acting officers of any corporation desiring to renew or revive its charter is available by reason of death, unknown address or refusal or neglect to act at the time of its renewal, the directors of the corporation, or those remaining on the board if not less than three, may elect a successor to the officer or officers who are dead or whose addresses are unknown or who refuse or neglect to act. In any case where there shall be less than three directors of the corporation available for the purposes aforesaid, by reason of death, unknown address or refusal or neglect to act, the stockholders of the corporation may elect as many directors as may be necessary, together with the directors who are ready and willing to act, to constitute a board of three directors or they may elect a full board of directors, as provided by the by-laws of the corporation, and the board may elect successors to the officers who are deceased or whose addresses are unknown or who refuse or neglect to act. A meeting of the directors of the corporation for the election of officers may be called by any officer or any director upon ten days' written notice delivered personally or mailed to the last known post office address of each director. A meeting of the stockholders for the purpose of electing directors may be called by any officer, director or stockholder upon ten days' written notice delivered or mailed to the last known post office address of each stockholder. Any two of the officers may then take all steps and do all things necessary and proper to be done for the renewal or revival of the existence of the corporation as provided in this section.

"(i) After a renewal or revival of the charter of the corporation shall have been effected, the two officers who signed the certificate of renewal or revival shall, jointly, forthwith call a meeting of the stockholders of the corporation upon not less than ten days' written notice, and at the meeting the stockholders shall elect a full board of directors, which board shall then elect such officers as are provided by law, by the charter or the by-laws to conduct and carry on the business and affairs of the corporation. * * *." (Revised Code of Delaware of 1935, Ch. 65, Secs. 2106 and 2107, General Corporation Law, Secs. 74 and 75, Laws of Delaware of 1945, Vol. 45, Ch. 158.)

"Sec. 314. Status of corporation.

"Any corporation desiring to renew, extend and continue its corporate existence, shall upon complying with the provisions of sections 312 or 313 of this title, and with the provisions of section 2 of Article IX of the Constitution of this State, be and continue for the time stated in its certificate of renewal, a corporation and shall, in addition to the rights, privileges and immunities conferred by its original charter, possess and enjoy all the benefits of this chapter, which are applicable to the nature of its business, and shall be subject to the restrictions and liabilities by this chapter imposed on such corporations." (Revised Code of Delaware of 1935, Ch. 65, Sec. 2109, General Corporation Law, Sec. 77.)

We have shown by Exhibit E attached following R. 638 that the bankrupt became inoperative and void on April 1, 1937, for nonpayment of taxes, that it was proclaimed by the Governor on January 24, 1938, and that no reinstatement proceeding had been instituted on August

19, 1954, a date subsequent to the purported appeal to the Court of Appeals. Petitioner inferentially freely admits that no such proceeding has been had or initiated.

Said Section 510, *supra,* provides that if a Delaware corporation "neglects or refuses for two consecutive years to pay the State any franchise tax or taxes, * * * the charter of the corporation shall be void, and all powers conferred by law upon the corporation are declared inoperative, * * *."

Section 511, *supra,* provides for a declaration by the Governor declaring that the charter of all such corporations are repealed.

Section 512, *supra,* provides for the filing of such proclamation with the Secretary of State, and for the transmittal of a certified copy thereof to each county in the state and a recordation thereof by the recorder of each county.

Section 513, *supra,* provides that whoever exercises or attempts to exercise any powers under a certificate of incorporation, after the issuance of such proclamation by the Governor, shall be fined or imprisoned, or both.

Section 278, *supra,* when read in connection with the sections following it, shows quite clearly that the litigation therein referred to is litigation in the courts of Delaware. That section provides that dissolved corporations continue for three years after "dissolution, bodies corporate for the *purpose* of prosecuting and defending suits by or against them, and of enabling *them* gradually to settle and close *their business,* to dispose of and convey *their* property, and to divide *their* capital stock, *but not for the purpose of continuing the business for which the corporation was formed.*" This section makes further provisions to the effect that such dissolved corporations, as to

actions, suits or proceedings commenced against the corporation before or within three years after dissolution, shall, *only for the purpose of such actions, suits or proceedings,* be continued corporate bodies until any judgments, orders or decrees therein shall be fully executed. (Emphasis added.)

Section 279, *supra,* provides that as to any such dissolved corporation, the Court of Chancery, on application of any *creditor or stockholder* of the corporation "may either appoint one or more of the directors thereof trustees, or appoint one or more persons to be receivers, of and for the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation" with power to defend and prosecute suits "in the name of the corporation, or otherwise. * * * that may be necessary for the final settlement of the unfinished business of the corporation."

Section 280, *supra,* provides that the Court of Chancery shall have jurisdiction of the application under said Section 279.

Section 281, *supra,* prescribes the duties of trustees and receivers of dissolved corporations, and the use by them of the funds of the corporation, after the payment of prior charges, with which to "pay the other debts due from the corporation, if the funds in their hands shall be sufficient therefor, and if not, they shall distribute the same ratably among all the creditors who shall prove their debts *in the manner that shall be directed by an order or decree of the court for that purpose.* If there shall be any balance remaining * * *, they shall distribute and pay the same to * * * (the) stockholders of the corporation * * *" (not to the corporation). (Emphasis added.)

The capital of a corporation upon dissolution becomes a fund for the payment of creditors and stockholders. At common law, a corporation not holding meetings of stockholders became not legally dead but dormant, capable of being revived but incapable of corporate action without such revival. (*Higgins to Use of Wil. & Reading R. R. Co. v. Downward & Sons,* 8 Houst. 227, 14 Atl. 720, 32 Atl. 133 (1888).)

Where the charter of a corporation was declared void for non-payment of franchise taxes, the corporation may be continued under Section 42 (now Sec. 278 of said Title 8) in order to wind up its affairs. (*Big Sespe Oil Co. v. Cochran,* 276 Fed. 216 (C. C. A. 9th, 1921).)

Section 42 (now Sec. 278 of said Title 8), which continues a corporation's existence for three years after repeal of its charter for the limited purpose of prosecuting and defending suits and winding up its business, applies to a corporation whose charter has become inoperative and void for non-payment of its franchise tax. (*United Automatic Rifle Corp. v. Johnson,* 41 Fed. Supp. 86 (D. C., Mass., 1941).)

Section 282, *supra,* provides that if any action pending in the *state* court has not been reduced to final judgment, the action is to be continued in "the names of the trustees or receivers of the corporation * * *."

In short, Sections 278-282, *supra,* all fall under Title 8, Chapter 5, Subchapter X of the Delaware Corporation Franchise Tax Law, effective February 12, 1953, which Subchapter X is entitled "Sale of Assets; Dissolution and Winding Up," and all relate to such actions and proceedings in the State Courts of Delaware.

Before those sections could apply, the dissolved bankrupt corporation would have to be possessed of an estate to be administered and wound up. In the case at bar the bankrupt was adjudicated on January 12, 1937, by consent of the bankrupt, on an involuntary petition filed on March 19, 1935. On January 12, 1937, the title to all of the bankrupt's assets vested in the Trustee, effective as of March 19, 1935, and ever since adjudication such assets have been administered thereunder by the Trustee.

Up until 1952, when the order for liquidation was made, the estate of the bankrupt was being administered as a going business, within the meaning of Section 52 of the Revenue Act of 1938. (See *United States v. Metcalf*, 131 F. 2d 677.)

Had such operation been carried on by the Trustee under said Section 278, *supra* (which provides for continuing corporate capacity to perform certain specific acts for certain designated purposes, "but not for the purpose of continuing the business for which the corporation shall have been established"), such operation would have been in excess of the powers granted under said Section 278 and would have been illegal under Section 513, *supra*.

The proceeding to have the defunct corporation declared bankrupt, terminated and became final on January 12, 1937, when the corporation was adjudicated bankrupt with the consent of the bankrupt. Its charter became inoperative and void on April 1, 1937. The petition for liquidation was not filed until April 14, 1952. The order of liquidation was made on May 26, 1952, was taken up on review and affirmed on November 28, 1952. No appeal therefrom was taken and it long since has become and remains final.

The petition for liquidation was neither "an action, suit, or proceeding begun or commenced *by* or *against the corporation* prior to * * * dissolution * * * (nor was it) begun or commenced *by or against the corporation* within three years after the date of the * * * dissolution * * *," and consequently did not operate to keep the corporation alive for the purpose of that petition, within the meaning of the last sentence of said Section 278, *supra.*

Neither was the petition for approval and confirmation of sale of the bankrupt's unliquidated assets, nor the amended and supplemental petition for sale and confirmation of sale of those assets, an action, suit or proceeding *against the corporation.*

In the case of *Harned v. Beacon Hill Real Estate Co.,* 9 Del. Ch. 411, 84 Atl. 229 (1912), the Supreme Court of Delaware, at pp. 422-423, explained the purpose of Section 278, *supra,* as follows:

> "* * * While a dissolved corporation is not continued for the purpose of doing the business for which it was created, it continues in order that, for the period of three years, the corporation itself may settle and close its business, and, if it fails so to do, that thereafter its creditors and stockholders may, by application to the Court of Chancery, secure the appointment of trustees or receivers who shall make final settlement of the unfinished business of the corporation. And any property which may not have been disposed of by the company *before dissolution, or during the succeeding three years,* is not lost, but remains the property of the corporation, so that it may be sold and disposed of *for the benefit of creditors and stockholders.*" (Emphasis added.)

The Trustee was simply pursuing his duties under the Bankruptcy Act and said order for liquidation and distribution of the assets of the bankrupt estate then owned and possessed by the Trustee when he proceeded with the liquidating sale.

The proceeding was in its nature a proceeding *in rem* and not *in personam,* and did not even require notice to the bankrupt, as distinguished from the creditors. (U. S. C., Title 11, Ch. 6, Sec. 94a; 6 Am. Jur. 569, Sec. 26; *Local Loan Co. v. Hunt,* 229 U. S. 294, 78 L. Ed. 1230, 93 A. L. R. 195.)

It occurs to us that the question of whether state statutes and state decisions can be given any effect in matters involving the assets of a bankrupt estate in the administration thereof, was put at rest in *Gross v. Irving Trust Co.,* 289 U. S. 342-345, 77 L. Ed. 1243, at 1244-1245. In that case a receiver had been appointed for a corporation which later became bankrupt. The receiver took over the assets and proceeded with the performance of its duties. After adjudication in bankruptcy, the trustee sold all of the bankrupt's assets, including those involved in the receivership, and the receiver, according to the state law and decisions, applied to the state court for an order fixing their fees, which order was granted. Thereafter the federal district court ordered the receiver and attorneys to account to it for their fees. The trustee claimed that the state court order was void and in violation of the Bankruptcy Act. This claim was upheld by the District Court and affirmed by the Circuit Court. Certiorari was granted by the United States Supreme Court. At pages 1244-1245 the Supreme Court said:

> "The sole question presented for our determination is: Did the state chancery court have the power to fix

the compensation of its receivers and their counsel after bankruptcy had supervened within four months of the filing of the bill of complaint in, and the appointment of receivers by, that court?

"The state courts of New Jersey have steadily held in the affirmative, and that view is not without support. We deem it unnecessary, however, to review these decisions. They are not in harmony with the views expressed by this court or with other decisions, which in our opinion, state the true rule.

"Upon adjudication of bankruptcy, title to all the property of the bankrupt, wherever situated, vests in the trustee as of the date of filing the petition in bankruptcy. The bankruptcy court has exclusive jurisdiction, and that court's possesssion and control of the estate cannot be affected by proceedings in other courts, state or federal. Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734, 737, 75 L. Ed. 645, 660, 51 S. Ct. 270, and cases cited. Such jurisdiction having attached, control of the administration of the estate cannot be surrendered even by the court itself. *Id.*, 739. 'The filing of the petition is a caveat to all the world and in fact an attachment and an injunction.' May v. Henderson, 268 U. S. 111, 117, 69 L. Ed., 870, 874, 45 S. Ct. 456, and citations. And see generally Moore v. Scott (C. C. A. 9th) 55 F. 2d 863; *Re* Diamond (C. C. A. 6th) 259 Fed. 70, 44 Am. Bankr. Rep. 268."

Thus it appears that the very things which, under Section 278, the dissolved corporation, its receiver or trustee are allowed to do and perform after dissolution are the same things which the trustee in bankruptcy is required to do and perform.

The bankrupt possesses no greater rights in California than it possesses in Delaware where it was incorporated.

In *Fidelity Metals Corp. v. Risley,* 77 Cal. App. 2d 377, at 381, the court concisely stated this principle in the following language:

> "It appears to be settled law that the effect of the dissolution of a corporation, or its expiration otherwise, depends upon the law of its domicile. (Restatement, Conflict of Laws, pp. 228-229, §158; 20 C. J. S., pp. 128-129, §§1899, 1900), and that a defunct foreign corporation has no greater capacity or higher standing to commence or maintain an action in the state of the forum than it would have in the state of its domicile." (See also Rule 17(b) F. R. C. P.)

A Dissolved and Defunct Corporation Is Without Right or Power to Do Any Act Necessary to Effect a Valid Appeal From an Order Authorizing and Confirming a Liquidating Sale of Remaining Assets, Exclusive of Cash, Under a Final Order of Liquidation; and the Same Rule Should Apply to Every Bankrupt, Natural or Corporate.

This corporation became bankrupt as of March 19, 1935 (the date of filing of the petition upon which the corporation, with its consent, was adjudicated a bankrupt on January 12, 1937, and before its dissolution), and on that date the title to all of its assets passed by operation of law to the trustee in bankruptcy. (*In re Sawilowsky,* 284 Fed. 975 (U. S. D. C. Fla); Sec. 70a of the Bankruptcy Act, U. S. C., Title 11, Ch. 7, Sec. 110.)

In the *Sawilowsky* case, just cited, the court at pages 975-976 said:

> "In the instant case if the trade name did pass to the trustee, there was no abandonment, and the cases bearing upon that question are not in point. In the instant case the trade name and good will were ap-

propriated and sold for the benefit of the creditors. As I have had occasion heretofore to point out (284 Fed. 158), the bankrupt, having parted with his property for the benefit of his creditors, can have no interest in the method of the disposal of same, and is not a person interested, who can have a review of the order of the referee confirming a sale of same."

The Circuit Court of Appeals, Fifth Circuit, in 288 Fed. 533, refused to disturb the decision of the District Court last above quoted from.

In re Settem, 118 Fed. Supp. 897 at 898 (1954), the *Sawilowsky* case was cited in support of the following text:

"Petitioner's right to review is somewhat doubtful, for he has parted with his property rights for the benefit of his creditors, and retains no interest therein. The property in the bankrupt estate has passed to petitioner's trustee."

The findings, conclusions and order of the referee were adopted and affirmed.

In *Ruckel v. Metropolitan Life Ins. Co.,* 240 Pac. 409, at 410, the Supreme Court of Kansas said:

"Once the federal trustee in bankruptcy has taken charge of an insolvent corporation's assets, business and affairs, pursuant to federal law, the corporation's officers and board of directors have no further official concern with it, unless and until it is financially rehabilitated and *surrendered* to their custody by order of the bankruptcy court." (Emphasis added.)

In *Berl v. Crutcher,* 60 F. 2d 440, a Delaware corporation acquired certain oil leases in East Texas. Subsequently it was adjudged bankrupt. Two years later it became defunct for failure to pay its Delaware franchise taxes.

The trustee abandoned the leases as worthless. The retained estate was administered and closed and the trustee was discharged. After several years oil was discovered on the land. The former stockholders and officers of the corporation, believing that the abandoned assets had fallen back to the corporation, revived or caused the corporation's charter to be revived by a Mr. Turner, a former stockholder and official of the corporation, by paying the delinquent taxes. Thereupon, the creditors in the original bankruptcy proceeding moved in, the bankruptcy was reopened, a new receiver or trustee was appointed, and took possession of the abandoned assets. There were subsequent proceedings in the bankruptcy court and the case went up to the Circuit Court. One of the questions on appeal was whether there was any validity in the acts of the officers of the dissolved corporation, which had been defunct for many years, in taking steps to revive it, and other corporate action which had a bearing on the procedure.

The Circuit Court at page 444 of its decision made the following comment:

> "It is the general rule in the United States that, where the charter or by-laws of a corporation provide for the annual election of officers and directors, and no election is held, the former officers hold over until their successors are elected. But this applies to a going concern, where there is no break in the exercise of the duties of the officers and directors. In this case the by-laws provide for annual elections of officers and directors by the stockholders. Since the date of bankruptcy, January, 1923, there have been no meetings of stockholders and no elections. The corporation was insolvent, and with the adjudication in bankruptcy all of its property passed out of its con-

trol, and the officers and directors ceased to function. Its charter was repealed two years after bankruptcy. When that occurred, the corporation might be considered dissolved by operation of law. * * * We are not required to determine whether the act of Turner in having the charter revived again vested the corporation with legal existence, but it would be ridiculous to say that the former officers and directors have any authority at this time to represent the corporation or its stockholders in any disposition of its property. Any authority they may be given hereafter must come from the stockholders."

Thus again we have a judicial recognition that after the dissolution of a Delaware corporation its officers and directors are without power to act and that any such power must come from the stockholders.

This brings us to a consideration of whether the officers or directors of the dissolved bankrupt corporation possessed any power or authority to adopt the purported resolution of the dissolved bankrupt corporation attached to the purported notice of appeal filed herein. [R. 593, 594.]

We claim that the purported resolution was a nullity and that the purported appeal based thereon is also a nullity.

The purported resolution reads as follows:

"Resolution

"At a special meeting of the F. P. Newport Corporation, Ltd., held on August 10th, 1954, the following resolution was adopted:

"RESOLVED, that Milton B. Safier be and he is hereby employed and designated as counsellor and attorney-at-law to file notice of appeal from the judgments and orders of Judge Leon R. Yankwich,

and each of them, as affecting the F. P. Newport Corporation, Ltd., signed and dated July 13, 1954, to the United States Court of Appeals for the Ninth Circuit and he is directed and authorized to file any and all notices of appeal, cost bonds and other necessary papers in connection with the said appeal.

"He is further authorized to associate with him on the appeal any attorney or attorneys who he may thereafter select.

"Dated at Los Angeles, California, this 10th day of August, 1954.

F. P. Newport
President

(SEAL) F. P. Newport Corporation, Ltd.
J. B. Gribble
Secretary
F. P. Newport Corporation, Ltd."

It will be noted that this purports to be a resolution of the dissolved bankrupt corporation passed at a special meeting of that corporation (not of its stockholders) held on August 10, 1954. It purports to set forth a corporate act which the defunct corporation is incapable of performing. On its face it purports to be a corporate act employing an attorney to appeal to the Court of Appeals from the orders designated in the purported notice of appeal [R. 593] made by the District Court. It will be noted from the affidavit of Mr. Norman A. Bailie filed in support of the motion to dismiss appeal [R. 603, 614] that Mr. Milton B. Safier who signed the notice of appeal to the Court of Appeals had never before appeared as attorney for the bankrupt corporation in any of the bank-

ruptcy proceedings, and that Mr. L. M. Cahill had appeared as attorney for the bankrupt (and certain objecting creditors) in all prior proceedings involved in this bankruptcy.

If such employment were held to be a lawful act of the defunct corporation, the resolution contains an implied obligation to pay for the services performed by the attorney in the course of such employment, and thus the contracting of a new obligation not for any purpose of liquidating any assets of the bankrupt estate, but to prevent such liquidation and thus to delay the Trustee in the performance of his duties both under the order of liquidation and under the Bankruptcy Act. We think that neither the defunct corporation, its former officers or directors possess any such power.

We can see no escape from the conclusions (1) that the purported resolution is a nullity; (2) that the purported corporate act is not one which the dissolved bankrupt corporation is authorized to perform in view of the finality of the order of liquidation; and (3) that the purported resolution and the purported appeal based thereon were designed solely for the purpose of further delaying the Trustee in the performance of his duties under the Bankruptcy Act and in the execution of the final orders of the bankruptcy court designed to accomplish the expeditious liquidation of the assets and the winding up of the bankrupt estate.

We believe the authorities heretofore cited by us herein support the foregoing conclusions.

The Remaining Assets of the Bankrupt Estate Are Insufficient to Discharge the Approved Unsecured and Unpaid Claims, the Interest Due Thereon, and the Remaining Costs, Fees and Expenses of Administration.

The assets of the estate, as shown by the affidavit of Mr. Norman A. Bailie [R. 603] in support of the Trustee's motion to dismiss the purported appeal, consist of $407,000.00 payable under the order appealed from, plus $17,275.46 in the hands of the Trustee, aggregating the sum of $424,275.46.

The certificate of Referee Dickson [R. 633] filed in support of said motion, shows the approved, unsecured and unpaid claims against this estate amount, in the aggregate, to the sum of $187,906.84. Interest thereon from the 19th day of March, 1935, to and including the 19th day of October, 1954, computed at the legal rate of 7% per annum, aggregates $257,586.96, aggregating, principal and interest $445,493.80.

With respect to the allowance of this interest, we quote an excerpt from Judge Yankwich's memorandum opinion [R. 617] rendered by him on the review of the Referee's order confirming the sale of the assets:

> "The Referee was also right in allowing interest to the unsecured creditors. In all liquidations, whether under bankruptcy or other statutes, if there be a surplus in the estate, interest is allowed on unsecured claims. (See *In re* John Osborn's Sons & Co., Inc., 2 Cir., 1910, 177 Fed. 184; Johnson v. Norris, 1911, 5 Cir., 190 Fed. 459, 463-465; American Iron & Steel Mfg. Co. v. Seaboard Airline Ry., 1914, 233

U. S. 261; Federal Deposit Ins. Corp. v. Citizens State Bank of Niangua, 1942, 8 Cir., 130 F. 2d 102; Ticonic Bank v. Sprague, 1938, 303 U. S. 406, 410-411; Fujikawa v. Sunrise Soda Water Works, 1946, 9 Cir., 158 F. 2d 490, 494-495; Heightstown Rug Co. v. National Savings and Trust Co., 1947, U. S. App. D. C., 162 F. 2d 10.)

"The theory behind the cases is that regardless of any direct agreement, interest is due the creditor the moment his debt becomes due and is not paid. If the estate, whether in bankruptcy, receivership, or statutory liquidation, is insolvent, the interest, although it runs during the period when the assets are insufficient to pay the principal of the claims, will not be paid. But if there is a surplus, interest will be paid. And this rule applies whether the liquidation is brought about by the voluntary act of the debtor or by the act of creditors or statutory liquidating authorities. The objection to interest reveals once more the inconsistency in the attitude of the bankrupt in this case. On the one hand, after it has succeeded in keeping the estate in court for nearly twenty years, it still insists that the period should be extended further and the sale of all the remaining assets be denied approval by the Court. Yet it would deny to its unsecured creditors the right to receive interest during the long period of this administration. One does not have the right to do business at the expense of one's creditors. And where the creditors have been denied the right to receive their principal debt when due, and through good management or good fortune, a surplus exists, it is more consonant with the equitable principles of bankruptcy that the surplus be used to pay interest to the creditors rather than that it be turned over to the bankrupt."

In Mr. Bailie's said affidavit, at Reporter's Transcript 615, it is pointed out that no fees for the Trustee's attorneys have been applied for or approved (a) for any services rendered by said attorneys in connection with the proceedings for the sale of the assets to Mr. Colter or to Mr. and Mrs. Colter; or (b) for any services rendered by said attorneys subsequent to October 31, 1953. There also remain to be allowed and paid (1) the costs and expenses of the pending litigation, including attorneys' fees, and (2) the usual Referee's and Trustee's fees, which have accrued and will continue to accrue until the bankrupt estate is fully wound up and finally settled. It is safe to assume that pending that event fees, costs and expenses will aggregate many thousands of dollars.

Section 22 of Article XX of Treadwell's Constitution of California, as amended on November 6, 1934, so far as applicable reads:

> "Art. XX, §22. Interest rates. (See preceding section bearing same number.*) The rate of interest upon the loan or forbearance of any money, goods or things in action, or on accounts after demand or judgment rendered in any court of the State, shall be seven per cent per annum but it shall be competent for the parties to any loan or forbearance of any money, goods or things in action to contract in writing for a rate of interest not exceeding ten per cent per annum."

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*An earlier section of this Article XX, pertaining to "Intoxicating Liquors," was adopted in 1932, so that there presently appear under Article XX two Sections 22.

The law applicable to the allowance of interest on allowed claims, where there is more than sufficient to pay the principal of such claims, is concisely set forth in 6 American Jurisprudence, at pages 840-841, Section 494, as follows:

> "Sec. 494.—Surplus of Assets over Claims.—If it should happen, as it rarely does in bankruptcy, that the assets are sufficient to leave a surplus after payment of all claims in full, interest is allowable on claims duly proved and allowed from the date of the filing of the petition in bankruptcy to the date of payment. Interest on claims accruing after the filing of the petition in bankruptcy is payable before the distribution of surplus to the bankrupt, although the contracts upon which the claims are based do not expressly provide for interest, and no demand for after-accruing interest was made by claimant. The trustee is entitled to retain possession of the assets until he has accumulated funds enough to satisfy such interest. It has been held further that interest should be computed according to the ordinary rule for the computation of interest where partial payments have been made on an interest-bearing debt—that is, a payment is first to be applied to discharge the interest then due on the principal obligation, and the remainder in reduction of the principal indebtedness. The bankrupt cannot object to the payment of interest accruing on claims from the time of filing of the petition, where there is a surplus remaining after the payment of all claims proved, on the ground of the discharge granted him in bankruptcy.
>
> "The allowance of a claim in bankruptcy is a judgment within the rule that judgments in the courts of the United States bear the same rate of interest as judgments in the courts of the state, respectively, where they are rendered."

The California case of *Greva v. Rainey,* 2 Cal. 2d 338, at 342-343, follows the principles quoted in the above text. We quote briefly therefrom:

> "At common law interest was not recoverable. (See National Bank of the Commonwealth v. Mechanics' Nat. Bank, 94 U. S. 437, 24 L. Ed. 176.) In cases where the special statute involved is silent on the question of interest, a host of authorities appears to have settled the question by the application of the general statutes providing for interest in upholding the right of the creditors to recover interest on their claims whenever a surplus of corporate assets remains, before any distribution of such surplus assets is made to the stockholders of the corporation.
>
> "In the case of State v. Park Bank & Trust Co., 151 Tenn. 195, 268 S. W. 638, 29 A. L. R. 449, * * * it was also decided that demand for such interest is unnecessary, but that the interest was properly computed from the date of suspension of business. That case and the cases cited in the annotation following the report in 49 A. L. R., at pages 457 *et seq.,* disclose that the general rule that after property of an insolvent is *in custodia legis* interest thereafter accruing will not be allowed, is not applicable where the assets of the debtor are sufficient to pay the claims with interest. * * *
>
> "In Johnson v. Norris, 190 Fed. 459, 111 C. C. A. 291, L. R. A. 1915B, 884 (certiorari denied, 232 U.S. 723, 34 Sup. Ct. 479, 58 L. Ed. 815), it is pointed out that were the rule otherwise the extraordinary result would follow that a delay in payment brought about by a proceeding to liquidate assets to satisfy the claims of creditors would prevent the creditors' collecting interest from an estate able to pay it, when the general law is that interest is given for delay

in payment. The remark made by the court in Brown v. Lamb, 6 Met. (Mass.) 203, that 'he becomes in fact a solvent debtor, and his duties and obligations are the same with those of other solvent debtors', becomes pertinent in any case involving a liquidation proceeding where sufficient assets remain to pay interest on the claims of creditors and there is no express statutory provision withholding application of the general laws that interest at the legal rate is payable."

Greva v. Rainey, supra, at page 344, discusses the cases of *People v. American Loan & Trust Co.,* 172 N. Y. 371, 65 N. E. 200, and *People v. Merchants' Trust Co.,* 187 N. Y. 293, 79 N. E. 1004, as follows:

"In commenting upon the statement in People v. American Loan & Trust Co., *supra,* that 'if the assets are sufficient to pay all, including interest, it must be paid, for, as against the corporation itself, interest should be allowed before the return of any surplus to the stockholders,' the court in People v. Merchant's Trust Co., *supra,* said: 'It may be admitted that these remarks were unnecessary to the disposition of the case then under consideration, but the rule thus asserted appears to us to be so eminently just and so well supported by other authority that we now have no hesitancy in adopting it as the rule that should be adhered to in disposing of questions of this character,' citing other cases."

Greva v. Rainey, supra, is quoted from and followed by the Ninth Circuit Court of Appeals in the case of *Kiyoichoi Fujikawa v. Sunrise Soda Water Wks. Co.,* 158 F. 2d 490 (1946). In this last case the Supreme Court of the United States denied an application for a writ of certiorari (331 U. S. 832, 91 L. Ed. 1846). On January 12,

1948, the same court denied a motion for leave to file a second petition for a rehearing. (332 U. S. 853, 92 L. Ed. 422.)

Petitioner appears to urge that the unsecured claims were not allowed until long after bankruptcy, and should not in any event bear interest prior to the court order formally allowing them.

We think petitioner has a false conception respecting the allowance of such claims. It is our position that a sworn proof of claim is allowed when filed except to the extent that objections thereto are subsequently sustained; that the hearing is on the objections and not on the claim; and, that the claim, to the extent not affected by the sustained objections stands and bears interest from the date that the petition in bankruptcy was filed.

In *Edward B. Whitney, as Trustee in Bankruptcy of Dresser & Co. v. Emma B. Dresser,* 200 U. S. 532-535, 50 L. Ed. 584-585, it is said:

> "The only question warranting the appeal is whether the sworn proof of claim is ***prima facie*** evidence of its allegations in case it is objected to. It is not a question of the burden of proof in a technical sense,—a burden which does not change, whatever the state of the evidence,—but simply whether the sworn proof is evidence at all.
>
> "The circuit court of appeals observed that the proof of claim warrants the payment of a dividend in the absence of objection, and, therefore, must have some probative force. In reply it is argued that what is done in default of opposition is no test of what is evidence when opposition is made; that a judgment

may be entered on a declaration for want of an answer, yet a declaration is not evidence; that it is contrary to analogy to give effect to an *ex parte* affidavit, and that, on general principles, it is the right of any party against whom a claim is made to have it proved, not only upon oath, but subject to cross-examination.

"Notwithstanding these forcible considerations, we agree with the circuit court of appeals. The prevailing opinion, not only in the second circuit, but elsewhere, seems to have been that way." (Citing cases) . . . "The alternative would be that the mere interposition of an objection by any party in interest (§57d) would require the claimant to produce evidence. For if the formal proof is no evidence, a denial of the claim must have that effect. If it does not, then the formal proof is some evidence, even when there is testimony on the other side. The words of the statute suggest, if they do not distinctly import, that the objector is to go forward, and thus that the formal proof is evidence even when put in issue. The words are: 'Objections to claims shall be heard and determined as soon,' etc. §57f. It is the objection, not the claim, which is pointed out for hearing and determination. . . . We believe that the understanding of the profession, the words of the act, and convenient and just administration, all are on the side of treating a sworn proof of claim as some evidence, even when it is denied."

This decision was followed in *Gardner, Trustee v. State of New Jersey,* 329 U. S. 565, 572, 91 L. Ed. 504, 514 (1946).

Another case which shows that if there is a surplus remaining after the payment of allowed claims, interest

must be paid, is the case of *Johnson v. Norris,* 190 Fed. 459, where at 462 it is said:

> "With the exception of property exempt under state laws from liability for debts, the bankruptcy act provides for the distribution of the bankrupt's entire estate among his creditors. The only reference in the act to returning any of the estate to the bankrupt relates to unclaimed dividends. Dividends that remain unclaimed for six months after the final dividend has been declared are to be paid by the trustee into court; and dividends unclaimed for one year are, under the direction of the court, to be distributed to the creditors whose claims have been allowed, but not paid in full, and after such claims 'have been paid in full, the balance shall be paid to the bankrupt.' (Bankruptcy Act, §66.)"

In the same case at page 464, the court continued:

> "The facts are not very clearly and fully stated in *Re* John Osborn's Sons & Co., 177 Fed. 184, 100 C. C. A. 392, 29 L. R. A. (N. S.) 887; but the statement is sufficient to show that certain claims based on accounts had been proved against the bankrupt's estate and paid in full by dividends, and that the controversy was as to whether a surplus should be paid to the bankrupt or be used in paying interest on the claims, including interest which accrued subsequent to the allowance of the claims. The court, deciding that the proof and allowance of the claims were, in effect, judgments, held that they were entitled to be treated as judgments, and, as such, interest accruing both before and after their allowance should be paid on the claims. And National Bank of Commonwealth v. Mechanics' National Bank, 94 U. S. 437, 24 L. Ed. 176, is cited as sustaining this view by analogy. The Osborn case is the only one to which

our attention has been called, involving the distribution of a surplus, that has arisen under the present bankruptcy act."

Certiorari was denied by the United States Supreme Court in *Johnson v. Norris, supra* (232 U. S. 723, 58 L. Ed. 815).

Petitioner in Its Point III, Page 45, of Its Petition for Writ of Certiorari, Relative to the Dismissal of Petitioner's Proposed Plan of Reorganization Under Chapter X, Is Not Well Taken for Two Reasons, Namely, (1) the Purported Appeal Herein Involved Does Not Purport to Be an Appeal Therefrom, and (2) the Order of Dismissal Has Long Since Become Final.

The petition under Chapter X [D 314] was filed January 19, 1954. The order of dismissal [D 331] was filed on April 20, 1954. The notice of the purported appeal to the Court of Appeals [D 560] makes no reference whatever to said order of dismissal.

Said order of dismissal was authorized by Bankruptcy Rule 218, paragraphs (a) and (b) of the United States District Court for the Southern District of California.

The making of said rule was authorized by General Order 56, and by Rule 83 of the Federal Rules of Civil Procedure.

Petitioner's Contention Under Point VI, Page 55 of Its Petition for Writ of Certiorari to the Effect That the District Court Erred in Directing a Sale in Solido Rather Than in Separate Parcels, Has No Foundation Upon Which to Rest.

This contention is adequately answered, we think, by the following from pages 122-123 of the record. [R. 122-123.]

> "The Referee: What was your last bid?
>
> Mr. Snyder: $406,500.
>
> The Referee: Well, if Mr. Colter should fall down we might call upon you suddenly. So it is the old story, while there is life there is hope.
>
> Now, are there any further bids for separate parcels, for any of this property, to be made? If so I want it done now. Hearing none, I think the next order of business is to go ahead with the objections presented by Mr. Cahill on behalf of certain creditors and also on behalf of the bankrupt."

The Bankrupt Was Not in Anywise Injured (1) by the Fact That Mr. Neblett Represented Mr. and Mrs. Colter on the Purchase of the Unliquidated Assets; or (2) by the Fact, if It Be a Fact, That Mr. and Mrs. Colter Were Acting for Themselves and as the Undisclosed Agent for One or More Associates.

Petitioner in its Point XI, page 60 of its petition for writ of certiorari, insinuates some suspected wrongful or fraudulent act on the part of Colonel Neblett, but fails to specifically point out any such act.

Mr. Bailie's affidavit [R. 603] shows that Colonel Neblett never represented the bankrupt in any of the bankruptcy proceedings. [R. at 614.]

The fact that he had incorporated the bankrupt, and the fact that the receiver or trustee employed Mr. Neblett to complete the defense of certain litigation pending in the state courts, which he handled successfully [R. 637], should not be held to bar him from representing the purchasers from the bankrupt's successor in interest, the Trustee, who was acting under a final order of liquidation made by the bankruptcy court.

Petitioner in its Point XII, page 62 of its petition for writ of certiorari, claims that the Court of Appeals erred by failing to remand the case for the purpose of taking further testimony upon the purported allegations of fraud.

There is no allegation that any fact of a confidential nature was ever communicated to Colonel Neblett, nor that he made use of any such confidential information in his representation of the Colters; nor is there any allegation of fact which, if proven, would constitute actionable fraud.

Fraud is never presumed and it is elementary that one against whom a charge of fraud is made is entitled to a specific averment of the facts claimed to constitute the fraud. This principle is stated in 12 California Jurisprudence page 800, Section 62 as follows:

> "Sec. 62. Necessity of Pleading Facts.—Fraud is never presumed. Whenever fraud constitutes an element of a cause of action or defense which is of an affirmative nature the facts must be alleged. One against whom charges of fraud are made is entitled to specific averments of the acts of which he is accused, so that he may admit or deny them, and thus present real issues."

Another basic principle is that even if fraud is properly pleaded, no cause of action exists in the absence of an allegation of damage. (See *Rosenberg v. Lawrence,* 10 Cal. 2d 587, 590.) The amended bid was made by Mr. and Mrs. Colter, they qualified before the Referee, the sale was made to them after spirited bidding at public auction, no fraudulent acts have been alleged, and no damage to the bankrupt estate or to the bankrupt has been shown.

What we have said respecting clause (1) in the above title is equally applicable to clause (2) here under discussion.

Conclusion.

While we have not taken up under separate headings all of the points set forth in petitioner's petition to this court, we believe we have adequately covered all points which merit any discussion.

When all of petitioner's claims have been considered, these facts are made clear: (1) That the bankrupt, purporting to act through Mr. Newport, has persistently sought and is now seeking to prevent any sale of the assets of the bankrupt estate; (2) that the bankrupt, purporting to so act, has been and is by baseless claims and in every conceivable manner seeking to prevent the Trustee from performing the duties resting upon him under (a) the Bankruptcy Act and (b) the final order for the liquidation of the assets of the bankrupt estate; and (3) that if the bankrupt be permitted to prosecute successfully its petition for a writ of certiorari herein, the result will be to require the Trustee to use a substantial portion of the assets, which would otherwise be available for the credi-

tors, with which to pay the costs, expenses, printing charges, etc., including attorneys' fees, incident to a hearing of the purported appeal on the merits. This is inconsistent with the spirit and purpose of the Bankruptcy Act which requires a prompt liquidation of the assets and the distribution of the available proceeds among the creditors. (Sec. 47 of Bankruptcy Act of 1938, U. S. C., Title 11, Ch. 5, Sec. 75.) If this claimed right of appeal is upheld, any bankrupt can review every order confirming and appeal from every order affirming the sale of any asset, thus forcing the Trustee to exhaust the assets of the bankrupt estate in litigating such reviews and appeals, thereby depriving the creditors of the rights given them under the Bankruptcy Act.

Respectfully submitted,

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FILED
MAR 23 1955
HAROLD B. WILLEY, Clerk

No. 590

IN THE

SUPREME COURT

OF THE

United States

October Term, 1954

F. P. NEWPORT CORPORATION, LTD.,
Petitioner,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of F. P. NEWPORT CORPORATION, LTD., Bankrupt,
Respondent.

ANSWER TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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WESTERN PRINTING COMPANY, WHITTIER

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IN THE

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F. P. NEWPORT CORPORATION, LTD., *Petitioner,* vs. PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of F. P. NEWPORT CORPORATION, LTD., Bankrupt, *Respondent.*	No. 590

ANSWER TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice Earl Warren, and to the Honorable Associate Justices of the Supreme Court of the United States:

The Opposition to our Petition for Writ of Certiorari points up the importance of the questions raised by the petition, never heretofore decided by this Court and in conflict with decisions of other Court of Appeal and in conflict with the Laws of the State of Delaware.

Certiorari should therefore be granted in accordance with Rule 19B Rules of the Supreme Court of the United States.

THE OPPOSITION INCORRECTLY SETS UP MATTERS OF LAW AND FACT

While it is correct that several grounds of dismissal were presented in the written Motion to Dismiss the Appeal, they centered around the proposition that the franchise tax for the corporation had not been paid to the State of Delaware since April 1st, 1937, and that therefore the corporation had no legal capacity to prosecute the appeal. This was the basis of the entire argument in the United States Court of Appeals for the Ninth Circuit at the time Motion for Dismissal (which argument was not reported) and in which it was pointed out to the court that the appellant, as *cestui que* trust, has and had a substantial financial interest in the outcome of the appeal, especially if interest was improperly allowed or should not have been allowed by the Referee and that the appellant corporation would be made whole. After the payment of $187,000.00 in debts to the unsecured creditors and other expenses, there would still be a substantial sum left to the appellant.

The opposition fails to point out that all the proceedings held before the Referee and all proceedings held in the United States District Court were of a character in which the appellant herein (the corporation) proceeded on its merits; that the Referee heard

the matter on its merits and also the District Judge, and that an effort which was made before the District Judge to deny an extension of time and deny proceedings on appeal were denied by him. Thus, although two District Judges and the Referee treated the corporation as a going concern and operating under court permission, and the proceedings on which certiorari is sought were treated before the Referee and in the District Court as properly before it, the corporation was nevertheless denied an appeal by the Court of Appeals by its dismissal of the appeal without ruling on the merits of the issues raised on the appeal. This is a very important question in the law of Bankruptcy which has not been passed upon by this Honorable Court.

Other grounds for the dismissal which were set out in its Motion to Dismiss, equally, raised important questions of Bankruptcy Law.

I

Has Congress deprived the bankrupt of its right to appeal where the case is heard on its merits in the District Court and before the Referee? Does it have standing on appeal, the same as it did in the District Court and before the Referee, to have its issues determined on appeal, especially where it may be the beneficiary of $200,000 or more if the appeal is decided in its favor?

II

If the Trustee has been negligent, or willful, in failing to pay the state franchise tax, can this deprive the appellant of his right to appeal, especially when the District Court has authorized the corporation to do business and that corporation has operated as a going business concern under a state franchise tax from the State of California—it being a Delaware Corporation?

We may state that we made a demand upon the Trustee to pay the Delaware State taxes, which demand was refused and his refusal approved by the Referee recently, and the District Court March 14th, 1955.

Compliance with that demand, under Delaware Law, would reinstate the corporation under Title 8, Section 312 of the Delaware Statutes, and would revive its charter "together with all the rights, franchises, privileges and immunities and subject to all of its duties, debts and liabilities which had been secured or imposed by its original charter and all amendments thereto." All that the Trustee would have to do would be to pay $471.25.

CAN THE TRUSTEE DEFEAT AN APPEAL BY HIS FAILURE OR NEGLIGENCE TO ACT?

A corporation, either *de jury* or *defacto,* has authority to secure counsel to handle the appeal—counsel who are authorized to appear and act in the Supreme Court of the United States or in the United States Circuit Court. There is nothing in the Bankruptcy Act which bars a corporation, even though its charter has expired, from securing counsel to protect its rights and reinstate it. Otherwise, Section 312 of Title 8 of the Delaware Statutes would be meaningless. Also sub-section 7 of Chapter 1 of the Bankruptcy Act would be meaningless.

Congress has provided that all of the rights of a bankrupt shall be preserved equally with those of all of the other parties. That is the spirit and purpose of the Bankruptcy Act. Even a condemned man, who has lost his civil rights, is allowed counsel; in fact is required to be furnished with counsel if he is unable to secure the same.

Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158.

The same rule is true with reference to a corporation. It should have all of its rights preserved in any event.

The respondent has listed nine points as "Reasons" for denying the writ. Most of them are unsupported by authority. The first point is: "1. The Ninth Circuit Court of Appeals has not rendered a decision in conflict with the decisions of another court of appeals in the same matter." (Res. Br. 2). We cited in our

Opening Brief three cases, none of which have been answered in this Brief in Opposition. These cases are: *Watts v. Liberty Royalties Corporation* (10th Circ.) 106 Fed. (2d) 941, 944; *U. S. v. P. F. Collier & Son Corp.,* 208 Fed. (2d) 936 (7th Cir.), and *Bahen and Wright v. Commissioner,* 176 Fed. (2d) 538, 539 (4th Cir.). And, as to their other numbered "Reasons", we set out:

2.

The United States Court of Appeals for the Ninth Circuit decided this case contrary to the state law of the State of Delaware, as well as to the United States courts. This has not been met with any authority. See: *Watts v. Liberty Royalties Corporation,* (10th Cir.), 106 Fed. (2d) 941, 944; *U. S. v. P. F. Collier & Son Corp.,* 208 Fed. (2d) 936, (7th Circ.), and *Bahen and Wright v. Commissioner,* 176 Fed. (2d) 538, 539 (4th Cir.).

3.

We have pointed out the important questions of Bankruptcy Law involved in this case, which should be settled by the United States Supreme Court. No case in this Court has raised these fundamental questions.

4. 5.

The right of the bankrupt corporation, which is a *cestui que* trust, and may be the beneficiary of $200,000.00 or more, to appeal its case is before this Court.

The issues have been heard and decided on their merits in the District Court, without a disqualification on the part of the corporation to act for want of payment of the franchise tax. The right of the corporation, which was given the power to do business by the District Court, to appeal any adverse decision is also involved, and other questions of importance in the administration of bankruptcy as set out in our Opening Brief—particularly its right to interest in the amount, and the date from which that interest should apply.

These are important questions of federal law not heretofore decided by this Court.

On the question of interest, we think that the decision is contrary to the decisions of this Court. We also think that the United States Circuit Court of Appeals for the Ninth Circuit has departed from the accepted usual course of procedure in this matter in deciding the case on a technical motion and not on its merits. (Supreme Court Rule 19 (b).)

6. 7.

We have set out each point with accuracy and clarity and with argument, as required by the New Rules of the United States Supreme Court (Rule 21), and we have set out the matters necessary for the determination of the points.

8.

Point 8 is a misunderstanding of the law. We did not apply for an *extraordinary writ* under Section 1651

of Title 28. We applied for certiorari from the decision of the United States Court of Appeals for the Ninth Circuit dismissing the appeal. Therefore, we do not proceed under Rule 31.

9.

The Petition for Writ has the opinion of the Court of Appeals dismissing the appeal. The Memorandum Opinion of the referee; his findings of fact and his order authorizing and confirming the sale, and the previous order on review, and the order dismissing the petition under Chapter X were not heard or determined by the Court of Appeals. They are attached in the appendix herewith and show that those courts considered the rights of the corporation on its merits, made findings and conclusions against it on the merits. The Court of Appeals merely determined the Motion to Dismiss our appeal, which it labelled "PURPORTED" without reviewing the merits determined below.

While we do not understand, under those circumstances, that the Rules require us to set up the previous decisions which do not go to the question of the dismissal of the appeal and were not heard on those questions in the appellate court below, they are in Appendix A and B.

We have raised all of the other questions in our Petition that we deemed are involved in the appeal so that all questions might be presented to this Court.

The statement in the Opposition that, "There is no Delaware Statute which provides that a defunct cor-

poration would be revived if the Trustee were to pay Delaware's Claim No. 32 for $471.25 [R. 633-635], or the Delaware franchise taxes with or without penalties, for which bankrupt's charter was forfeited on April 1, 1937", is directly contrary to Title 8, Section 312, of the Delaware Statutes and Federal Cases construing the same.

The statement in the Opposition that, "The appellant has sought to prevent the sale of the assets", is not supported by the record. There is no stay of the proceedings of the sale below, and the parties have been at liberty to carry out the agreement, if they were so advised, at any time. The sale was without strings and there was and is no stay regarding the sale. If the respondent wishes to carry out the sale, there is nothing to stop him from it.

Respondent has discussed at length the important question of allowing interest (approximately 135 per cent in this case). Congress has not so provided in the Chandler Act, nor any amendment. It is for Congress to so determine. The absence of Congressional Command is a directive that none was intended. Not even tax claims to the government have been given this preference.

New York v. Saper, 336 U. S. 328, 330, 93 L. Ed. 710, 714;
Vanston Bondholders Protect. Com. v. Green, 329 U. S. 156, 163, 91 L. Ed. 166.

Elimination of interest would make this successfully operated corporation in bankruptcy administra-

tion solvent and perform an important function in bankruptcy and entitle the corporation to a dismissal of the bankruptcy proceeding as a solvent corporation.

The equity of the stockholders require the solicitude of the Court. The Trustee is not permitted to ravage the funds of the estate to the exclusion of the corporation that made it possible by the payment of uncalled for interest and by huge fees to attorneys and administrators.

These questions point up the great importance of this case in the administration of the law of bankruptcy.

We pray for certiorari.

Respectfully submitted,

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